

NO. 80704-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

JEFFREY BROOKS,

Petitioner.

ON MOTION FOR DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS, DIVISION ONE

REPLY BRIEF OF PETITIONER

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A. ARGUMENT

The trial court impermissibly imposed a sentence in which the total terms of confinement and community custody exceeded the statutory maximum for Jeffrey Brooks's offense. Mr. Brooks contends the only permissible remedy is to reduce the term of confinement, the term of community custody, or some combination of the two, until, as required by RCW 9.94A.505, the term imposed does not exceed the 120 month statutory maximum. Mr. Brooks contends any other remedy fails to comport with the Sentencing Reform Act's requirement that the trial court impose a determinate sentence, and violates the Separation of Powers provisions of both the federal and state constitutions.

The State's response rests upon a fundamental misunderstanding of the relevant law: that in every scenario, including in Mr. Brooks's amended sentence, the term of confinement is either the prescribed period or the period of earned early release. Thus the State surmises the term of community custody can never be determinate. The State's argument is incorrect, and Mr. Brooks's sentence is invalid on its face.

1. THE SRA REQUIRES A SENTENCING COURT IMPOSE A DETERMINATE SENTENCE IN WHICH THE COMBINED TERMS OF CONFINEMENT AND SUPERVISION DO NOT EXCEED THE STATUTORY MAXIMUM

The State contends a sentence which includes community custody can never be determinate because community custody must be imposed as a range and may be dependent upon the award of good time. Second Supplemental Brief of Respondent at

4. Even assuming that is the case, nothing prevents the court from imposing a range which does not exceed the statutory maximum for the offense.

"Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

RCW 9.94A.030(21).

Certainly, by this statutory definition the potential for earned early release does not render a sentence indeterminate. It is equally true that inmates subject to a term of community custody will serve that term in lieu of earned early release, or upon

completion of the confinement. RCW 9.94A.707(1). But neither of those truths support the State's leap to the conclusion that a trial court must then be permitted to impose a sentence which on its face violates RCW 9.94A.505(5).

Where the total term of confinement and community custody imposed exceeds the statutory maximum, the trial court has three options: decrease the term of confinement, decrease the community custody range, or some combination of the two. Thus, a person sentenced on a Class B felony with a standard range sentence of 96.75 to 128.25 months and a community custody range of 18 to 36 months could be sentenced 97 months confinement with a community custody range of 18 to 23 months. The same person could receive a sentence of 84 months confinement with a community custody range of 18 to 36 months. Each of those sentences is determinate because the confinement is stated with exactitude, and the applicable range of community custody range is also determinate. More important for this appeal, each sentences fully complies with RCW 9.94A.505(5).

But that is not what the trial court did here, nor is it what the State is asking. The State contends RCW 9.94A.715 permits a court to impose the full term of confinement, as well as the full

range of community custody, safe in the hope DOC will not administer the sentence beyond the statutory maximum. Second Supplemental Brief of Petitioner at 4. But, RCW 9.94.715 requires that “**when [the] court sentences**” the defendant, the court must choose between imposing the community custody range set forth in RCW 9.94A.850 or the period of earned early release. State v. Linerud, 147 Wn.App. 944, 950 n17, 197 P.3d 1224 (2008)¹

Plainly the statute requires the sentencing court, not DOC, to make an election at the time of sentencing. RCW 9.94A.715 does not permit the court to choose both options so as to impose the sort of hybrid term which the State urges upon this Court.

Underlying the State's motion is its bald contention that the purpose of the SRA is to permit sentencing courts, in every scenario, to impose the maximum term of confinement and the maximum amount of supervision. The State accuses Mr. Brook's, and the Court of Appeals in Linerud, of advancing a “prophylactic

¹ The Linerud court, in response to the State's motion to reconsider raising many of the same arguments the State recycles here, amended the decision on March 23, 2009, to add a footnote stating:

¹⁷ If the trial court wants to impose the maximum terms of confinement and community custody, it may do so under the second option in RCW 9.94A.715(1), which permits it to impose a term of community custody equal to the earned early release time.

The amended version of the Linerud opinion is not yet available on Westlaw.

approach" which is "not . . . dictated by the SRA, addresses potential errors but nor actual ones, and could result in [certain offenders] not serving the statutory maximum." Second Supplemental Brief of Respondent at 7. The State is unable to cite any legal authority to support that claim that Mr. Brooks's argument frustrates this imagined goal of the SRA. In fact, RCW 9.94A.505(5) suggests that is not among the legislature's goal. But once again the State has chosen to ignore that statute.

As Linerud recognized, the legislature understood what it meant when it required the sentencing court, in RCW 9.94A.715, to elect one of two options for setting the term of community custody. If the trial court wishes to maximize both the term of confinement as well as the term of community custody in a case where the defendant's standard range of confinement is approaching the statutory maximum, the court can simply choose the second option in RCW 9.94A.715(1); a term of community custody equal to the earned early release. If the court selects that option it could properly impose a term of confinement on a Class B felony of 120 months (assuming that is the top of the standard range), and any period of earned early release will be served as community custody. Assuming the person is eligible for up to 1/3 earned early

release² that sentence would be determinate as the community custody could still be expressed, at the time the sentence is imposed, as a range of 0 to 40 months (1/3 the term of confinement). The sentence would comply with RCW 9.94A.505 because the combined term of the sentence imposed would not exceed the statutory maximum. Moreover, that sentence would be determinate pursuant to definition of "determinate sentence" in RCW 9.94A.030(21), as the sentencing court could state with exactitude the term of confinement and range of community custody.

Thus, neither Mr. Brooks nor Linerud urge adoption of new prophylactic rule. Rather, the legislature has created such a rule already in the form of RCW 9.94A.505. That rule focuses upon the sentence imposed and not the sentence ultimately served. The sentence imposed by the amended judgment is not determinate, and is invalid on its face.

² The same is true of person eligible for 1/2 or 1/6 good time, the top of the resulting community custody range is simply the term of confinement multiplied by the applicable rate of accrual for earned early release.

2. IMPOSING AN UNLAWFUL SENTENCE ON
THE HOPE THAT DOC WILL NOT ENFORCE
IT VIOLATES THE SEPARATION OF
POWERS DOCTRINE.

The State contends that allowing the Department of Corrections to determine the sentence imposed does not violate the separation of powers doctrine because, the State surmises, the legislature has delegated the authority to administer sentences to the DOC. Second Supplemental Brief of Respondent at 7.


The SRA requires the imposition of determinate sentences so that there is certainty at the outset. That is what RCW 9.94A.505(5) requires, and that is what the State's argument has always failed to address. If the sentence **imposed** by the trial is not determinate it does not become determinate by the fact the DOC properly releases someone prior to the expiration of their maximum term. Again the State misapprehends the requirements of RCW 9.94A.715, which requires that "when [the] court sentences" the defendant, the court must choose between imposing the community custody range set forth in RCW 9.94A.850 or the period of earned early release. The statute does not allow the sentencing court to choose a hybrid and leave it to DOC to determine how that will be administered.

The legislature has not delegated to DOC the authority to determine what the sentence is. Instead, the legislature has required the trial court to impose a determinate sentence, and has required DOC to administer that sentence. The amended judgment violates the separation of powers doctrine.

B. CONCLUSION

For the reasons above, and those set forth in Mr. Brooks's Supplemental Brief, the "remedy" provided in the commissioner's ruling is no remedy at all. The remedy fails to comply with the terms of RCW 9.94A.505, fails to impose a determinate sentence, and violates the Separation of Powers doctrine. This Court should reverse Mr. Brooks sentence and remanded his case for imposition of a determinate sentence.

Respectfully submitted this 6th day of April, 2009.



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DECLARATION OF DOCUMENT FILING AND SERVICE

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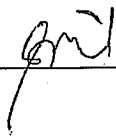
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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF APRIL, 2009.

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